DOCKET FILE COPY ORIGINAL

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CS Docket No. 97-151
	)	

To: The Commission

COMMENTS

AMERICAN ELECTRIC POWER SERVICE CORPORATION
COMMONWEALTH EDISON COMPANY
DUKE ENERGY CORPORATION
FLORIDA POWER AND LIGHT COMPANY

By: Shirley S. Fujimoto
Christine M. Gill
Thomas J. Navin
Catherine M. Krupka

Their Attorneys
McDERMOTT, WILL & EMERY
1850 K Street, Suite 500
Washington, D.C. 20006
(202) 887-8000

September 26, 1997

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The 1996 Act effected the most sweeping change in this Nation's telecommunications laws in sixty years. The change is premised on the notion that a deregulated, competitive telecommunications market results in efficiency and innovation and produces the greatest benefits for the American public. This notion is specifically embodied in the language of § 224(e) of the Act which requires that the Commission involve itself in pole attachment rate matters only "when the parties fail to resolve a dispute over such charges." The plain language of § 224 supports the principle that voluntary negotiations must be the fundamental means for setting rates for telecommunications carrier attachments to utility poles, ducts, conduit and rights-of-way. As such, the cornerstone of any approach adopted by the Commission pursuant to § 224 should be to allow free market negotiation of pole attachment rates. Where regulation is needed, that regulation should be minimal and designed to achieve a specific goal.

This approach to regulation of pole attachments is consistent with the decision by the U.S. Court of Appeals for the Eighth Circuit in the Iowa Utilities Board case as well as recent pronouncements by the Commission. As such, in order to facilitate the negotiation process, the Electric Utilities believe that any default pricing formula established pursuant to § 224(e) should be based on a Forward-Looking Economic Cost Pricing Model based on economic capital costs. Such an approach necessitates only one change in the Commission's current and proposed formulas: replace historical embedded costs with forward-looking economic cost and adjust the depreciation account accordingly.

The Commission must further recognize that its authority under § 224(e) is not plenary. The 1996 Amendments to the Pole Attachments Act make clear that the

Commission's authority is limited to regulating pole attachments made by telecommunications carriers to provide telecommunications services. Accordingly, the FCC must proceed in this rulemaking in a manner that is consistent with the interpretation it has given the terms "telecommunications," "telecommunications carriers" and "telecommunications services" in other rulemaking proceedings by excluding two-way video or information services from the definition of these terms as used in § 224.

It is clear that Congress intended that the FCC draw distinctions between the rates that an attaching entity pays based upon the nature of the service provided by the attaching entity. As such, the FCC must consider the specific use to which each attachment is put in order to determine if such attachment falls under the Pole Attachment Act. To the extent that attaching entities seek to attach facilities to poles, ducts, conduit or rights-of-way for purposes of providing or delivering information services or two-way video, the rate for such attachments must be fully negotiable and not subject to § 224, regardless of whether such service is being offered by an entity that is also providing telecommunications services or cable services.

Although the Electric Utilities believe that little regulation of pole attachments is required, in light of the different cost allocation models adopted by Congress for attachments made by "pure" cable system operators and telecommunications carriers, certain procedures are necessary to ensure the fair and efficient negotiation and resolution of pole attachment matters. Therefore, the Electric Utilities respectfully request that the FCC adopt the following procedures to facilitate application of the different rate structures: (1) a rebuttable presumption that cable service providers have become telecommunications carriers; (2) an annual certification by "pure" cable operators that their system is used solely to provide

traditional one-way cable services; and (3) a system for providing the utilities sufficient information about parties making pole attachments to manage the pole and conduit facilities.

Furthermore, in implementing the usable/unusable space formula set forth in § 224(e), the FCC may only count cable system operators, telecommunications carriers, and utility telecommunications ventures for purposes of calculating the number of attaching entities under the unusable space formula. The Commission should specifically exclude ILECs, government entities and entities leasing capacity from an existing attacher from being counted as an attaching entity for purposes of the unusable space formula. Similarly, the Commission must recognize that if companies overlashing cables are treated as attaching entities for purposes of the unusable space formula, then overlashed cables should be subject to a separate attachment fee.

Equally important, the Commission must abandon its effort to model the proposed conduit formula on the current pole formula. The proposed formula must be rejected because: (1) the electric utilities do not have the detailed information necessary to apply the proposed formula; (2) the electric utilities cannot share duct space with telecommunications providers; (3) the agency defines the asset too narrowly; and (4) it improperly treats reserve space. Because of the unique nature of conduit, the Commission should adopt a conduit formula that considers conduit on an individual case basis.

Finally, because rights-of-way that utilities own or control vary tremendously depending upon the size, width, soil conditions, access conditions, use restrictions, as well as state and local law, the FCC should refrain from any rate regulation of right-of-way whatsoever.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CS Docket No. 97-151
	)	

To: The Commission

COMMENTS

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation, and Florida Power and Light Company (collectively referred to as the "Electric Utilities"), through their undersigned counsel and pursuant to § 1.415 of the rules and regulations of the Federal Communications Commission (the "Commission" or "FCC"), hereby submit these comments regarding the calculation of rates to be charged for attachments to their poles, ducts, conduit and rights-of-way.

The Electric Utilities are investor-owned utilities engaged in the generation, transmission, distribution and sale of electric energy. Collectively, their service territories span multiple regions of the United States and together they provide electric service to millions of residential and business customers. The Electric Utilities own electric energy

distribution systems that include distribution poles, conduit, ducts and rights-of-way, all of which are used to provide electric power service to their customers. Portions of this infrastructure, particularly distribution poles, are used in part, for wire communications. To the extent that such distribution infrastructure is offered voluntarily and used for wire communications and the state has not preempted the FCC's jurisdiction, the Electric Utilities are subject to regulation by the Commission under the Pole Attachments Act.[1/]

As a preliminary matter, the Electric Utilities note that a number of electric utilities, including some who assisted in the development of these Comments, have filed suit in the federal district court in Pensacola, Florida challenging the constitutional validity of the nondiscriminatory access provisions of § 224(f) of the Pole Attachments Act.[2/] By presenting these Comments, the Electric Utilities are not requesting that the Commission consider or address the constitutional issues raised by the Pole Attachments Act. Moreover, the comments expressed herein are not intended, and should not be construed, to suggest that the nondiscriminatory access provisions of the Pole Attachments Act are constitutional or that any rate developed pursuant to that statute constitutes "just compensation" in a constitutional sense. The Electric Utilities expressly reserve any legal, equitable or constitutional rights,

---

1/ 47 U.S.C. § 224 (1997), as amended by § 703 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 104 Stat. 56, 149-51, signed February 8, 1996. Some of the Electric Utilities provide energy service in states that have preempted the Commission's jurisdiction under § 224 by making the certification required by 47 U.S.C. § 224(c)(2) and are, therefore, subject to state regulation of pole attachments. Nonetheless, because the federal statute serves as a loose "benchmark" for pole attachment and related issues, all of the Electric Utilities have a significant interest in the Commission's actions concerning such issues.

2/ Gulf Power Co. v. United States, C.A. No. 3:96 CV 381 (N.D. Fla.).

including, but not limited to, the rights arising under the Fifth Amendment of the Constitution, not to have their property taken without just compensation. Thus, the Electric Utilities reserve any and all legal and equitable relief that may be available to them in a court of law or equity based on constitutional infirmities.

I. Scope Of The NPRM

A. Introduction

This Notice of Proposed Rulemaking[3/] seeks comment on proposals to implement a methodology by which the Commission may calculate just, reasonable and nondiscriminatory pole attachment rates for telecommunications carriers, other than Incumbent Local Exchange Companies ("ILECs"), pursuant to § 224(e) of the Pole Attachments Act, as amended by § 703 (the "1996 Act Amendments") of the Telecommunications Act of 1996 (the "1996 Act"). The telecommunications carrier rate formula adopted in this rulemaking pursuant to § 224(e) will become effective on February 8, 2001.[4/]

B. The Electric Utilities Respectfully Request That The Commission Incorporate By Reference Their Submissions Made In The Pre-2001 Rate Rulemaking And In The Local Competition Proceeding

The FCC, through a previously initiated rulemaking, is also seeking comment on proposals to modify the formula used to calculate a rate for attachments to utility poles, ducts

---

[3/] Notice of Proposed Rulemaking, In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151 (released Aug. 12, 1997) ("Post-2001 NPRM").

[4/] 47 U.S.C. § 224(e). The rate will be phased-in over a five-year period in equal annual increments of twenty percent per year.

and conduit by cable system operators, and telecommunications carriers prior to February 8, 2001 (the "Pre-2001 Rate Rulemaking").[5/] In the Post-2001 NPRM, the Commission states that parties need not file comments in this proceeding that reiterate positions presented to the Commission in the Pre-2001 Rate Rulemaking.[6/] In the interest of streamlining the comments and reply comments filed in the current proceeding, the Electric Utilities request that the Commission incorporate by reference the comments and reply comments filed, and ex parte presentations made, on their behalf in the Pre-2001 Rate Rulemaking and the Local Competition proceeding.[7/] Furthermore, the Electric Utilities respectfully request that all rules promulgated pursuant to this rulemaking take into consideration the information provided to the FCC by them as part of the Pre-2001 Rate Rulemaking. For the convenience of the Commission, the Electric Utilities have attached copies of their comments and reply

---

5/ Notice of Proposed Rulemaking, In the Matter of Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98 (released Mar. 14, 1997) ("Pre-2001 NPRM").

6/ Post-2001 NPRM ¶ 8 (referencing comments and reply comments filed In the Matter of Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98).

7/ See American Electric Power Service Company, et al.'s Comments, Reply Comments and Petition for Reconsideration of the First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd 15,499 (released Aug. 8, 1996), 61 Fed. Reg. 45,476 (1996), rev'd in part sub nom., Iowa Utilities Board v. FCC, No. 96-3321 and consolidated cases, 1997 U.S. App. LEXIS 18183 (8th Cir. July 18, 1997) (the "Local Competition Order").

comments filed in the Pre-2001 Rate Rulemaking[8/] and their Petition for Reconsideration in the Local Competition proceeding.[9/]

C. Jurisdictional Issues

When Congress adopted the Pole Attachments Act, it intended that the Commission's jurisdiction extend to poles, ducts, conduit and rights-of-way.[10/] In its initial implementation of the Pole Attachments Act and in all related proceedings, the Commission has dealt solely with distribution poles. In the Pre-2001 Rate Rulemaking, the Commission stated that it is seeking to adopt a new conduit formula. In the Post-2001 Rate Rulemaking, the Commission stated that it is seeking more information on the viability of implementing a rate formula for rights-of-way. Significantly, however, in the Pre-2001 Rate Rulemaking, some parties argued that the Commission should extend its jurisdiction over pole attachments to include electric utility transmission towers,[11/] as well as the attachment of wireless equipment to utility poles.[12/]

The Electric Utilities argued in their Petition for Reconsideration of the Local Competition Order that the Commission does not have the statutory authority to regulate the rates, terms and conditions for the attachment of wireless equipment to electric utility

---

8/ See Attachments 1 and 2.

9/ See Attachment 3.

10/ 47 U.S.C. § 224(a).

11/ See Pre-2001 Comments of MCI Corporation at 21; Pre-2001 Reply Comments of AT&T Corporation at 9.

12/ See Pre-2001 Comments of AT&T Corporation at 9; Pre-2001 Reply Comments of AT&T Corporation at 9.

property or to regulate the rates, terms and conditions for any attachment to transmission facilities.[13/] Accordingly, until the Commission resolves the issues raised in the Local Competition proceeding, the Electric Utilities respectfully urge that this rulemaking only address rates for wireline attachment to utility distribution poles, ducts, conduit and rights-of-way. To the extent that parties to the proceeding argue that the proposed pole attachment rate formula be applied to transmission towers or wireless equipment, the Commission should recognize that a jurisdictional issue exists with regard to regulating these items.

Assuming arguendo that the Commission has jurisdiction to regulate attachments to transmission towers or wireless attachments, it should resolve such issues by initiating separate rulemakings aimed at developing specific rate formulas for equipment other than wireline attachments or for any infrastructure element other than distribution poles, ducts, conduit or rights-of-way. As such, the discussion in these Comments regarding rate formulas only addresses wireline attachments to distribution poles, ducts, conduits and rights-of-way.

II. Section 224(e) Gives The Commission Limited Authority To Regulate Pole Attachments Made By Telecommunications Carriers To Provide Telecommunications Services

In order to properly implement regulations pursuant to § 224(e), the FCC must follow the statutory definitions set out in the 1996 Act for the key terms used by Congress in amending § 224. The Supreme Court has long held that, when construing general and

---

13/ See American Electric Power Service Company, et al.'s Petition for Reconsideration and/or Clarification of the Local Competition Order, at 26 (filed Sept. 30, 1996).

specific provisions of a statute or act, the specific sections govern the general.[14] By reading § 224 in conjunction with the other provisions and underlying policies of the 1996 Act, it is apparent that Congress intended that application of § 224 be kept to a limited number of circumstances. More specifically, the FCC must implement its § 224 regulations following the definitions for "telecommunications carrier," "telecommunications services" and "telecommunications." Reading these definitions in light of the more specific language of the Pole Attachments Act leads to a clear framework for regulating pole attachments.

A. The Statutory Definitions Of "Telecommunications Carrier" And "Telecommunications Service" Must Be Read In Light Of § 224

Congress defined a "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services...."[15] "Telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[16]

After reviewing Congress's definition of "telecommunications carriers" and "telecommunications services," the term "telecommunications" must next be defined. Under the 1996 Act, "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the

---

[14] See, e.g., Townsend v. Little, 109 U.S. 504, 512 (1883).

[15] 47 U.S.C. § 153(44).

[16] 47 U.S.C. § 153(46).

form or content of the information as sent or received."[17] In its Universal Service Order,[18] the FCC further defined this term to include:

> cellular telephone and paging services; mobile radio services; operator services; PCS; access to interexchange; special access; wide area telephone service (WATS); toll-free service; 900 services; MTS; private line; telex; telegraph; video services; satellite services; and resale services.[19]

The FCC excluded providers of video-based services, such as cable television and open video systems, and information services from contributing to the universal service fund because these services do not constitute "telecommunications."[20] The FCC must proceed in this rulemaking in a manner that is consistent with the interpretation it has given the terms "telecommunications," "telecommunications carriers" and "telecommunications services" in other rulemaking proceedings by excluding two-way video or information services from the definition of these terms as used in § 224.

B. The FCC Must Consider The Specific Use Of Each Attachment When Adopting Or Applying A Pole Attachment Rate Formula

The FCC must narrow the application of § 224 to reflect the different uses to which pole attachments are put. The statute itself states that the Pole Attachments Act covers attachments to utility poles, ducts, conduit and rights-of-way by cable television system operators and telecommunications carriers.[21] It then establishes a dichotomy between costs

---

[17] 47 U.S.C. § 153(43).

[18] In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 62 Fed. Reg. 32,862 (released May 8, 1997) (the "Universal Service Order").

[19] Universal Service Order ¶ 780.

[20] Id. ¶ 781.

[21] 47 U.S.C. § 224(a)(4).

that will be shared by telecommunications carriers versus "pure" cable system operators.[22] It is clear that Congress intended that the FCC draw distinctions between the rates that an attaching entity pays based upon the nature of the service provided by the attaching entity. Thus, cable system operators solely delivering one-way cable service over their pole attachments are subject to one attachment rate. Telecommunications carriers or cable system operators using their pole attachments to offer or deliver telecommunications are subject to a different rate framework. Finally, attachments used by telecommunications carriers and cable system operators for providing two-way video or information services are not included under § 224 at all because such services fall outside the definitions of "cable service" and "telecommunications."

In its Notice of Proposed Rulemaking for the Post-2001 Rate Formula, the Commission queried whether its decision in Heritage Cablevision Associates of Dallas v. Texas Utilities[23] should be extended to other circumstances where utilities attempt to condition or limit the use of attachment space. In Heritage Cablevision, a pre-1996 Act case, the Commission determined that a utility may not charge different pole attachment rates based on the type of service provided by the cable operator. Significantly, however, this

---

[22] Section 224(d)(3) states that the rate specified in subsection (d) shall apply to attachments "used by a cable television system solely to provide cable service." 47 U.S.C. § 224(d)(3). Congress defined "cable service" to mean "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and ... subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service," where the programming provided is comparable to that provided by television broadcasting. 47 U.S.C. § 552(6).

[23] File No. 89-002, 6 FCC Rcd 7099 (1991).

decision was specifically overruled by the 1996 Act Pole Attachment Amendments which provide for a rate scheme dependent on the type of service provided. As such, contrary to the Commission's suggestion to extend its decision in Heritage Cablevision to the amended Pole Attachments Act, the Commission must recognize the statutory limitations imposed by the 1996 Act Pole Attachment Amendments and conform its rules accordingly.

Under the rules of statutory construction, the interpretation of the Pole Attachments Act set forth above by the Electric Utilities is the only reasonable interpretation that the Commission can follow.

C. Facilities Used To Carry Information Services Or Two-Way Video Are Not Covered By § 224

To the extent that attaching entities seek to attach facilities to poles, ducts, conduit or rights-of-way for purposes of providing or delivering information services or two-way video, the rate for such attachments must be fully negotiable and not subject to § 224, regardless of whether such service is being offered by an entity that is also providing telecommunications services or cable services. As noted by the Commission in its Universal Service Order, information services and two-way video services are not telecommunications services.[24/] If the FCC is choosing to exempt providers of such services from contributing to the Universal Service Fund based on this definitional distinction, the FCC must be consistent in applying the same definition in its other proceedings. In the context of pole attachments, § 224 covers telecommunications and cable services delivered over wires. By the Commission's own

---

[24/] Universal Service Order ¶ 781. See discussion supra at Section II.A.

definition, then, the Pole Attachments Act does not apply to attachments that carry information services or two-way video over wires.

D. Wireless Equipment Is Not A "Pole Attachment"

Equally important, the purpose of the original 1978 Pole Attachments Act and the 1996 Act Amendments thereto further refines how the FCC must interpret the language in § 224. As was thoroughly discussed in the Electric Utilities' comments and reply comments filed in the Pre-2001 Rate Rulemaking and their Petition for Reconsideration filed in the Local Competition proceeding, and contrary to the arguments made by parties such as AT&T in the Pre-2001 Rate Rulemaking, Congress intended that the Pole Attachments Act apply only to wire attachments.[25/] As such, the Commission must recognize that § 224 does not give the Commission authority to regulate the rates charged for wireless attachments to utility poles, ducts, conduits and rights-of-way.

III. Congress Intended That Telecommunications Carriers Be Subject To A Negotiated Rate For Attaching To Poles, Ducts, Conduit and Rights-Of-Way

Section 224(e)(1) of the Pole Attachments Act requires the FCC to promulgate regulations to govern the rates paid by telecommunications carriers for pole attachments used to provide telecommunications services in the event the parties are unable to reach a voluntarily negotiated rate for such pole attachments.[26/] While the 1996 Act did grant the

---

25/ Pre-2001 Reply Comments of AEP, et al., at Section XVIII; Pre-2001 Comments of AT&T Corporation at 9; Pre-2001 Reply Comments of AT&T Corporation at 9; see also discussion supra at Section I.C.

26/ 47 U.S.C. § 224(e)(1).

Commission authority to oversee pole attachment agreements between telecommunications carriers and utilities, this authority is limited to circumstances when parties fail to agree. Furthermore, even when the parties fail to agree, the underlying policies of the 1996 Act require that the Commission exercise restraint in the nature and scope of the actions it takes to bring the parties to an agreement.

A. Voluntarily Negotiated Agreements Must Be The Norm

The plain language of § 224 supports the principle that voluntary negotiations must be the fundamental means for setting rates for telecommunications carrier attachments to utility poles, ducts, conduit and rights-of-way. First, the congressional intent to encourage negotiated pole attachment agreements, including negotiated rates, is clear. In its explanation of the amendments to the Pole Attachments Act, the Conference Committee reporting the telecommunications legislation to the Congress stated:

> The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms and conditions for attaching to poles, ducts, conduits and rights-of-way owned or controlled by utilities.[27/]

The relevant statutory language providing for negotiations was adopted unchanged from the Conference Report. Thus, the legislative history serves as explicit evidence that Congress intended negotiations to play the predominant role in determining individual rates for pole attachments. Significantly, in this regard, meaningful negotiation can occur only when the

---

27/ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 207 (1996) (emphasis added).

default pricing mechanism established by the Commission is somewhere close to the price on which the parties would agree absent such regulation.[28/]

Second, a negotiated pole attachment rate also comports with the public policies underlying the 1996 Act. The 1996 Act is intended "to provide for a pro-competitive, de-regulatory national policy framework ... by opening all telecommunications markets to competition."[29/] The Senate, in crafting its version of the telecommunications legislation stated that "[c]ompetition, not regulation, is the best way to spur innovations and the development of new services. A competitive market place is the most efficient way to lower prices and increase value for consumers."[30/] Congress wanted to reduce formal regulation in favor of "market" regulation. "The basic thrust of the bill is clear: competition is the best regulator of the marketplace."[31/] Similarly, the House of Representatives styled its legislation as a bill "[t]o promote competition and reduce regulation."[32/] Thus, even where Congress recognized that some regulation might be warranted during the transition period from a regulated to a deregulated marketplace, it put in place procedures to reduce or eliminate such regulation where possible.[33/]

28/ See Pre-2001 Comments of AEP et al. at Exhibit 1, Reed Report at 23-24.

29/ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996).

30/ S. 652, § 5(1).

31/ 142 Cong. Rec. S688 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings).

32/ See H.R. 1515.

33/ See, e.g., 47 U.S.C. § 252(a)(1) (providing that an incumbent local exchange carrier and a party requesting interconnection may enter into a binding agreement without regard to the interconnection standards set forth in § 251(b) and (c)).

That Congress intended that the market be the primary regulator of the telecommunications industry has also been affirmed by the courts. The U.S. Court of Appeals for the Eighth Circuit recently vacated significant portions of the Commission's Local Competition Order.[34/] While the basis for the court's decision was largely jurisdictional,[35/] the court did hold that certain provisions of the Local Competition Order violated Congress's intent that the FCC and the telecommunications industry rely on private negotiations and general principals of contract law as the means for minimizing and guiding FCC regulation of interconnection agreements.[36/]

The Commission's own implementation of the 1996 Act confirms the importance of voluntarily negotiated agreements. For example, although the Commission determined in its Local Competition Order that nondiscriminatory access to poles, ducts, conduits and rights-of-way is required, the Commission declined to establish a "comprehensive regime of specific rules, but instead establish[ed] a few rules supplemented by certain guidelines and

---

34/ See supra note 7.

35/ The court vacated the pricing rules of the Local Competition Order stating that the FCC exceeded its jurisdiction by seeking to regulate intrastate telecommunications, thus infringing on the jurisdiction of the states. Iowa Utilities Board, slip op. at 101.

36/ The Court vacated the "pick and choose" and "most favored nation treatment" rules adopted by the FCC because these procedures were in direct contradiction of Congress's interest in two-sided negotiations. Iowa Utilities Board, slip op. at 115. Pick and choose — the ability of one party to select individual clauses from previously negotiated agreements — was found to be improper because it allowed one party to derive the benefits of individual contract provisions without having to assume any of the corresponding "costs" exchanged by the first party to receive the benefit. Id. at 116. The FCC's most favored nation treatment rules were implicitly vacated, as part of the court's rejection of pick and choose, because they gave a party to a contract the ability to unilaterally change the terms of an executed and binding agreement. Id.

presumptions that ... will facilitate the negotiation and mutual performance of fair, pro-competitive access agreements."[37/]

In short, negotiations should be the prevailing means of determining a rate for access by telecommunications carriers to the distribution infrastructure owned by electric utilities. Congress recognized that, when moving to a competitive market paradigm for communications services, it is critical that regulations not interfere with the ability of the participants in the marketplace to define and identify solutions to their own needs.[38/] "Good faith" negotiations aimed at reaching a pro-competitive agreement over the rates, terms and conditions upon which pole attachments can be made is consistent with Congress's intent and the statutory scheme. Any rate regulations the Commission may adopt in this proceeding must honor the Congressional intent — the important role of negotiations — embodied in the statutory scheme. The Commission must thus modify its proposed interpretation of § 224(e) to be consistent with the de-regulatory, pro-competitive underpinnings of the 1996 Act.

B. The FCC's Proposed Implementation Of § 224(e) Is Contrary To Congress's Intent

In the Post-2001 Rate Rulemaking NPRM, the FCC has stated its preference that telecommunications carriers and utilities negotiate pole attachment agreements.[39/] However, the FCC then goes on to say, without citation, that Congress recognized that

---

37/ Local Competition Order ¶ 1143.

38/ See generally Speech by Chairman Hundt, Antitrust Conference for Corporate General Counsels, 1996 FCC LEXIS 5935.

39/ Post-2001 NPRM ¶ 12.

access is critical to encouraging competition in the telecommunications industry and that attaching entities do not have equal bargaining power in the course of negotiating pole attachment agreements.[40/] Based on this bald assertion, the FCC then concludes that § 224(e) is no more than an endorsement of its current pole attachment complaint procedure which requires that a complainant include a brief summary of all the steps taken to resolve its dispute before filing a complaint.[41/] This interpretation fails to give any effect to Congress's mandate that negotiated agreements serve as the mainstay of these contracts. With its interpretation, the FCC merely gives lip service to this mandate and, instead, sets up a scheme in which federal regulation of the rates charged by utilities for telecommunications carrier attachments to their poles, ducts, conduit and rights-of-way will predominate. It also fails to recognize the distinctions in the language used in § 224(e) and § 224(d). The Commission cannot, on the one hand, endorse negotiated rates and, on the other, propose an interpretation of § 224(e) that completely subverts the binding nature of such rates or the process used to arrive at a rate.

Section 224(e) states that the FCC must promulgate regulations to govern pole attachment charges for telecommunications carriers to help parties reach agreement. This language set up a regulatory imperative that, post-2001, the FCC move away from its traditional heavy-handed rate regulation to an approach that is akin to a mediator helping utilities and attaching entities find mutually agreeable attachment terms. Had Congress intended the outcome proposed by the FCC — that § 224(e) simply means that a

---

40/ Id.

41/ Id.

telecommunications carrier must provide a summary to the FCC of its dispute resolution efforts prior to securing an artificially low regulated rate — it would not have adopted § 224(e) at all. Instead, Congress would have simply broadened the Pole Attachments Act to include telecommunications carriers. As such, the FCC must conform its regulations to encourage negotiations. In the rate context, this can be done either by setting a regulated rate that is close to a market rate for telecommunications carrier access to poles, ducts, conduits and rights-of-way or by avoiding altogether the regulation of pole attachment rates paid by telecommunications carriers.

The simplest benchmark on which the FCC can rely for deriving a market-comparable regulated rate would be forward-looking economic cost.[42/] General principles of economics dictate that attaching entities and utilities will price access to poles, ducts and conduit based on their assessment of the costs associated with the attaching entity constructing a similar infrastructure. The foundation for such a comparison would be the forward-looking economic cost value of the assets (e.g., a pole or conduit system). In essence, attaching entities generally will not pay a "lease" fee that is higher than the cost to "buy," thus forcing the utility not to charge a "lease" rate that exceeds the "buy" cost.

The Electric Utilities grant that this analysis is simplistic. However, in the interest of creating a simple regulated rate formula that more closely mirrors the market, the Electric

---

42/ See Pre-2001 Comments of AEP, et al., at Sections IV & V. The Forward-Looking Economic Cost Pricing Model necessitates only one change in the Commission's current and proposed formulas: replace embedded historical costs with forward-looking economic costs and adjust the depreciation account accordingly.